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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Richard Di Donato, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

v.

Insys Therapeutics, Inc.; Michael L.
Babich; Darryl S. Baker; and John N.
Kapoor,

Defendants.

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No. 16-cv-00302-NVW

CLASS ACTION

**SUPPLEMENT TO CLASS
REPRESENTATIVE'S MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT WITH DEFENDANT
MICHAEL L. BABICH**

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Pursuant to the Court’s July 24, 2020 Order (Doc. 400), the Court-appointed Class Representative (together with the Plaintiff Class, “Plaintiffs”) and Defendant Michael L. Babich (“Mr. Babich” or the “Settling Defendant” and, together with Class Representative, the “Settling Parties”) hereby respectfully submit this supplement (“Supplement”) to Class Representative’s motion for preliminary approval of the proposed settlement of the above-captioned action (“Action”) between Class Representative and Mr. Babich. Doc. 399.¹

I. MR. BABICH’S CURRENT ASSETS

As of June 2020, Mr. Babich had approximately \$23.1 million in assets, consisting of approximately \$21.6 million in marketable and unmarketable securities, a significant portion of which is substantially illiquid, and \$1.5 million in cash assets. *See* Declaration of Russell Piccoli (“Piccoli Decl.”), ¶ 5, attached as Exhibit 1 to the Declaration of Johnston de F. Whitman, Jr. (“Whitman Decl.”).

As set forth in Class Representative’s Motion for an Order Preliminarily Approving Settlement with Michael L. Babich (the “Preliminary Approval Motion”) (Doc. 399), Mr. Babich’s current assets are offset by, among other things, his unsatisfied forfeiture and restitution obligations—in excess of \$74 million—imposed as a result of his guilty plea in *United States of America v. Babich, et al.*, No. 1:16-cr-10343-ADB (D. Mass.) (“Criminal Action”). Furthermore, as discussed below, Mr. Babich is currently defending numerous other pending matters that collectively seek more than \$3 billion in damages (the “Concurrent Litigation”). *See infra* Section III.A.

II. THE SOURCE OF FUNDING FOR THE PROPOSED SETTLEMENT

Mr. Babich intends to fund the Settlement Amount by paying cash from the approximately \$1.5 million in cash assets that he currently holds. Piccoli Decl., ¶¶ 5,7.

¹ All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement Between Lead Plaintiff and Defendant Michael L. Babich dated July 21, 2020 (the “Stipulation”). Doc. 399-1.

1 **III. MR. BABICH'S POTENTIAL TO PAY A GREATER AMOUNT**

2 Mr. Babich is not in a position to pay more to settle this matter given his current
3 financial condition, as constrained by the \$74 million in unsatisfied forfeiture and
4 restitution obligations arising from the Criminal Action and the more than \$3 billion in
5 exposure from the cases comprising the Concurrent Litigation. As the Court recognized,
6 "settlements must always leave defendants better off than a total liquidation of assets."
7 Doc. 400 at 2. Here, the proposed Settlement payment that Mr. Babich has agreed to
8 make must be evaluated in light of: (i) his ability to pay, not only based upon his assets
9 counterbalanced by his unsatisfied liabilities discussed above, but also considering his
10 financial exposure to the Concurrent Litigation; and (ii) the appreciable risk that, even if
11 Plaintiffs prevailed following a time-consuming and expensive trial, given Mr. Babich's
12 constrained assets and existing financial obligations to federal and state regulators, the
13 Plaintiff Class would recover less than the Settlement Amount (or nothing), because they
14 would likely be relegated to pursuing claims against Mr. Babich's bankruptcy estate
15 alongside (at best) state and federal regulators, among others, that already have stipulated
16 judgments against Mr. Babich.

17 **A. Mr. Babich's Ability to Pay**

18 As stated in the Preliminary Approval Motion, Mr. Babich's unsatisfied forfeiture
19 and restitution obligations to the federal government exceed his current net worth by
20 more than \$49 million. Doc. 399 at 9-10. These federal judgments present a direct
21 restraint on Mr. Babich's ability to pay a greater amount here.

22 Moreover, the Settling Parties have attached as Exhibit 2 to the Whitman Decl. a
23 document addressing the cases comprising the Concurrent Litigation, together with
24 damages estimates, which exceed \$3 billion in the aggregate. Mr. Babich's ability to pay
25 more to fund a settlement of Plaintiffs' claims against him in the Action is constrained by
26 his collective financial exposure from and his ongoing need to fund a defense of the
27 claims against him in the Concurrent Litigation. Piccoli Decl., ¶¶ 8-9. Additionally, a
28 payment from Mr. Babich greater than the costs of defending the claims against him in

1 this Action could create a run on Mr. Babich's currently negative net worth from the
2 plaintiffs suing him in the Concurrent Litigation. *Id.*, ¶ 9. If successful, these claims
3 would lead Mr. Babich into bankruptcy. *Id.*

4 Given these circumstances, Mr. Babich's position is that the \$250,000 Settlement
5 Amount, representing his counsel's estimated cost of defending Mr. Babich through the
6 conclusion of this matter, was the maximum settlement payment that Mr. Babich could
7 make. Piccoli Decl., ¶ 8. In this regard, Mr. Babich viewed paying any greater Settlement
8 Amount and trying the case to verdict in Plaintiffs' favor as presenting a roughly
9 equivalent risk of insolvency for Mr. Babich. *Id.*, ¶ 10. For Plaintiffs, their alternative to
10 accepting the Settlement Amount to resolve the Action as to Mr. Babich was to try the
11 case, at great expense;² and, if successful, pursue their judgment against Babich alongside
12 other creditors, including the State of Arizona, in Babich's likely inevitable bankruptcy
13 filing. *Id.*, ¶¶ 13-14; *see also infra* Section III.B.

14 The proposed Settlement provides an immediate cash payment for the benefit of
15 the Class, as opposed to the likelihood of recovering less or nothing following a costly
16 trial and lengthy appeals process. In this regard, "[i]t is well-settled law that a cash
17 settlement amounting to only a fraction of the potential recovery does not per se render
18 the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459
19 (9th Cir. 2000) (citation omitted). "Estimates of what constitutes a fair settlement figure
20 are tempered by factors such as the risk of losing at trial, the expense of litigating the
21 case, and the expected delay in recovery (often measured in years)." *Schaffer v. Litton*
22 *Loan Servicing, LP*, 2012 WL 10274679, *11 (C.D. Cal. Nov. 13, 2012); *see also, e.g.,*
23 *Larson v. Harman-Mgmt. Corp.*, 2019 WL 7038399, at *6-7 (E.D. Cal. Dec. 20, 2019)

24
25
26 ² Plaintiffs' cost of trying the case would far exceed the cost to Mr. Babich. Among
27 other things, Plaintiffs have retained three expert witnesses, at least two of which are
28 certain to testify at trial, while Mr. Babich has none. Additionally, as Class Counsel
neither resides nor maintains offices in Phoenix, there would be considerable costs
securing CDC-compliant travel, lodging, and office space for a minimum of three weeks
in preparing for and presenting at trial.

(preliminarily approving settlement representing less than 0.1% of potential statutory damages).

Moreover, the proposed Settlement, combined with the settlements reached in the Action with Defendants Darryl S. Baker and John L. Kapoor, will provide the Class with a collective payment of no less than \$2.95 million, with the potential to increase to up to \$12.25 million, comprising a favorable aggregate recovery for the Class. *See* Doc. 399 at 13-14.

B. The Plaintiff Class’s Risk of Recovering Less Than the Settlement Amount, Even After Securing a Jury Verdict Against Mr. Babich

It is well-established that the proposed Settlement must be considered alongside the risk that the jury would find in Mr. Babich’s favor following a costly trial, as well as the risk that any such verdict would be affirmed in a time-consuming post-verdict appeal. *See* Doc. 399 at 12-13; *see also* Doc. 400 at 1 (among the factors considered in evaluating a proposed settlement is “the cost of continued prosecution of the case”); *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016) (“A trial of a complex, fact-intensive case like this could have taken weeks, and the likely appeals of rulings on summary judgment and at trial could have added years to the litigation.”).

While Plaintiffs’ Counsel believes that Plaintiffs’ claims against Mr. Babich are meritorious and supported by admissible evidence, Mr. Babich’s counsel, on the other hand, believes that he can prevail at trial (Piccoli Decl., ¶ 11), and numerous other securities class actions with sound claims have proceeded to trial with the class recovering nothing. *See, e.g., In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict for plaintiff class, and granting judgment as a matter of law to defendants), *aff’d on other grounds*, 688 F.3d 713 (11th Cir. 2012); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of over \$81 million for plaintiffs against accounting firm reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988); *In re Apple*

1 *Comput. Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (after jury rendered a
2 verdict for plaintiffs following an extended trial, the court overturned the verdict).

3 In addition to the omnipresent risk of losing at trial, however, Plaintiffs here also
4 face a far more relevant and demonstrable risk that they would likely secure *little or no*
5 *financial recovery even after obtaining a jury verdict in their favor at trial.*

6 **1. A Jury Verdict Will Likely Cause Mr. Babich to Become**
7 **Insolvent, Triggering the Arizona Attorney General’s Right to**
8 **Enforce Immediately a \$642 Million Stipulated Judgment**
Against Mr. Babich

9 On July 19, 2019, the State of Arizona, through Arizona Attorney General Mark
10 Brnovich, filed a complaint in the Superior Court of the State of Arizona in and for
11 Maricopa County against Mr. Babich and others alleging violations of both the Arizona
12 Consumer Protection Act, Arizona Revised Statutes (“ARS”) §§ 44-1521, *et seq.*, and the
13 Arizona RICO statute, ARS §§ 13-2301, *et. seq.*, in connection with alleged acts and
14 omissions by Mr. Babich in marketing Subsys. Case No. CV2019-010695 (the “AZAG
15 Action”). On June 26, 2020, Mr. Babich entered into a Stipulated Consent Judgment (the
16 “AZAG Judgment”) to resolve the claims alleged against him in the AZAG Action.
17 *See* Whitman Decl. at Ex. 3.³ Among other things, the AZAG Judgment provides for
18 judgment in the amount of \$599.2 million against Mr. Babich as a civil penalty and
19 judgment in the amount of \$45 million against Mr. Babich as disgorgement. *Id.* at p. 6.
20 Of the combined \$644,200,000 in penalties and disgorgement, Mr. Babich agreed to pay
21 \$2,000,000, or 0.31%. Piccoli Decl., ¶ 8.E.

22 The AZAG Judgment also provides that if Mr. Babich files for bankruptcy under
23 Title 11 of the United States Code within 120 days of Mr. Babich’s payment of the
24 \$2,000,000 reflected therein, then such payment *will not be recognized* as satisfying
25 Mr. Babich’s \$644,200,000 in penalties and disgorgement if any creditor, such as
26

27 ³ The AZAG complaint and the AZAG Judgment also name as a defendant
28 Mr. Babich’s wife, Natalie Levine, on the alleged basis that Ms. Levine benefitted from
the alleged misconduct through her marital community with Mr. Babich.

1 Plaintiffs here, files a petition for relief against Mr. Babich's estate. Whitman Decl. at
2 Ex. 3 at pp. 6-7. In such instance, the State of Arizona would have a claim as to the
3 remaining \$642,000,000 in penalties and disgorgement under the AZAG Judgment. In
4 any event, the AZAG Judgment further provides that the State of Arizona reserves its
5 right to pursue the remaining \$642,000,000 in penalties and disgorgement under the
6 AZAG Judgment if Mr. Babich files for bankruptcy protection at any time. *Id.* at 7.

7 Given that the trial of Plaintiffs' claims against Mr. Babich in this Action is
8 anticipated to conclude during the first week of September 2020, a decision in Plaintiffs'
9 favor would be almost certainly be rendered within 120 days of Mr. Babich's June 26,
10 2020 partial payment of penalties and disgorgement under the AZAG Judgment.⁴
11 Mr. Babich's counsel has represented that if Plaintiffs obtain a judgment from this Court,
12 then Mr. Babich is likely to promptly file for bankruptcy protection. Piccoli Decl., ¶ 10.
13 In such instance, Plaintiffs' ability to collect any portion of the trial judgment in this case
14 will, at best, be competing with the State of Arizona's claim to \$642,000,000, and
15 Plaintiffs will in all likelihood recover nothing after prevailing at trial.⁵ Even if
16 Mr. Babich files for bankruptcy later than approximately October 23, 2020, Plaintiffs will
17 be competing with the State of Arizona, the federal government (as discussed below in
18 Section III.B.2), and other claimants (as discussed above in Section III.A) to try to obtain
19 a portion of a trial judgment secured here.

24 ⁴ The 120-day period referenced in the AZAG Judgment will run on or about
25 October 23, 2020.

26 ⁵ Mr. Babich has also entered into a Stipulation for Judgment (the "Alabama
27 Stipulation") in a case that the Mobile County Board of Health brought against him and
28 other defendant parties in the Circuit Court of Mobile County, Alabama. *See* Whitman
Decl. at Ex. 4. Pursuant to the Alabama Stipulation, Mr. Babich has agreed to have
judgment entered against him in the amount of \$750 million. *Id.* If the Alabama Court
approves the Alabama Stipulation, then Mobile County will have a \$750 million claim
against Mr. Babich if he files for bankruptcy protection. Piccoli Decl., ¶ 13.

1 **2. A Jury Verdict for the Plaintiff Class Will Likely Cause the**
 2 **Federal Government to Execute Immediately Upon the**
 3 **\$74 Million in Combined Forfeiture and Restitution Amounts**
 that Mr. Babich Owes

4 Based upon the approximately \$74 million in outstanding and unsatisfied
 5 forfeiture and restitution amounts that Mr. Babich owes in connection with the Criminal
 6 Action, Plaintiffs believe that it is likely that the federal government would seek to
 7 collect on those same outstanding amounts in the event that the jury renders a verdict in
 8 Plaintiffs' favor in this Action. This action by the federal government, in response and in
 9 addition to a judgment in Plaintiffs' favor, is almost certain to cause Mr. Babich to file
 10 for bankruptcy. Piccoli Decl., ¶ 11. In this instance, Plaintiffs' claims against Mr.
 11 Babich's estate would be, at best, competing with the State of Arizona's and the federal
 12 government's aggregate claims of approximately \$716 million,⁶ all but assuring that
 13 Plaintiffs would receive nothing from a trial victory in this Action.

14 **IV. CONCLUSION**

15 For all of the foregoing reasons and those detailed in Class Representative's
 16 Preliminary Approval Motion, the Settling Parties respectfully request that the Court
 17 grant preliminary approval of the Settlement and enter the proposed Preliminary
 18 Approval Order. The Settling Parties are available to respond to any further questions the
 19 Court may have regarding the Settlement.

20 DATED: July 29, 2020

Respectfully Submitted,

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 28 ⁶ As noted above, if the court in Mobile, Alabama approves the Alabama
 Stipulation, then Plaintiffs would be, at best competing with aggregate claims of at more
 than \$1.4 billion against Mr. Babich's bankruptcy estate.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to those persons who are CM/ECF registrants:

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